



**Ndirangu v National Bank Of Kenya Limited (Cause E521 of 2022)
[2024] KEELRC 1764 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1764 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E521 OF 2022
BOM MANANI, J
JULY 11, 2024**

BETWEEN

DORCAS WACUKA NDIRANGU CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted the instant suit to challenge the Respondent's decision to terminate her contract of employment. According to her, the Respondent's action was unjustified. As such, it should be declared unlawful.
2. On the other hand, the Respondent contends that its decision to terminate the Claimant's employment was justified. As such, it should be upheld and the suit dismissed with costs.

Claimant's Case

3. The Claimant instituted the case through a Memorandum of Claim dated 22nd July 2022. She contends that the Respondent engaged her services on 1st April 2008. She further contends that at the time the employment relation was terminated, she had been in the Respondent's service for a period of fourteen years.
4. The Claimant avers that for the duration of her service to the Respondent, she worked in various positions with the last one being that of Customer Services Consultant. It is her case that throughout her service to the Respondent, she worked diligently and her performance was excellent. She contends that her last station was the Respondent's Ruiru branch.



5. The Claimant contends that despite her great service, the Respondent begun exerting undue pressure on her in March 2021 with the sole intention of frustrating the employment relation between them. She contends that the Respondent's actions exposed her to physical and emotional distress.
6. The Claimant has enumerated several incidences which she says point to a choreographed scheme to push her out of employment. First, she asserts that the Respondent subjected her to a flawed performance review process in March 2021. Through this, the Respondent allegedly wrongly graded her before the results were revised upwards after she challenged the process through an appeal.
7. According to the Claimant, the manner in which the Respondent handled her performance appraisal pointed to an attempt by it (the Respondent) to unfairly push her out of employment. She contends that after the flawed exercise, the Respondent hastily and maliciously issued her with a baseless warning letter. She further argues that despite the matter having been resolved in her favour following her appeal, the Respondent failed to vacate the warning letter.
8. Second, she asserts that the Respondent's management issued her with a series of notice to show cause letters without proper justification. She says that the first of these letters was issued to her on 14th October 2021. In the letter, the Respondent allegedly accused her of having wrongfully withheld funds which had been entrusted with her by two of its (the Respondent's) customers for purposes of opening new accounts. She contends that the reason why she held the funds was that she was unable to immediately deposit the money onto the new accounts since the Respondent's account opening processes were faulty and often resulted in the failure to facilitate the instant setting up of new accounts.
9. She contends that the second show cause was issued to her on 31st December 2021. In the letter, the Respondent allegedly improperly accused her of frequent lateness in reporting to and unexplained absence from duty. It is her case that on the occasions on which she either reported late or failed to report to work, she was either unwell or was attending to her sick child.
10. She further contends that she made effort to notify the Respondent's management of her predicaments. However, her telephone calls and text messages were ignored.
11. She avers that on 3rd March 2022, the Respondent issued her with yet another show cause letter accusing her of having mishandled a client. She was allegedly required to show cause why disciplinary action should not be taken against her for violating the Respondent's policies and procedures. It is this third show cause letter that catapulted into the decision to terminate her services.
12. The Claimant avers that the decision to terminate her contract was improper. She accuses the Respondent of having terminated her services before she had been issued with a final warning. She contends that the first warning letter which was issued to her on account of poor performance ought to have been vacated after her performance was found to have been satisfactory. As such, the so called final warning that was issued to her in November 2021 was technically her first warning. She argues that the Respondent's decision to terminate the contract whilst she was on her first warning issued in November 2021 violated the Collective Bargaining Agreement between the Respondent and her Trade Union.
13. The Claimant further argues that the Respondent did not supply her with the investigation report and particulars in respect of the incident that led to termination of her contract before the disciplinary hearing commenced. As such, the disciplinary proceedings were flawed.
14. She also argues that the Respondent's decision to terminate her services was contrary to the recommendation by its Disciplinary Committee. She contends that the Committee had recommended



that she be issued with a final warning. As such, the decision to terminate her contract went contrary to the Respondent's own Disciplinary, Capability and Grievance Manual.

Respondent's Case

15. On its part, the Respondent avers that the Claimant's contract was terminated for legitimate cause and in accordance with due process. It contends that the decision was occasioned by the Claimant's acts of gross misconduct and unacceptable service delivery.
16. The Respondent contends that immediately before the decision to terminate the Claimant's services, she had treated one of its clients uncourteously. As a result, the aggrieved client had lodged a formal complaint against her.
17. The Respondent avers that the aforesaid infraction by the Claimant which was witnessed by her colleagues at the branch resulted in the decision to issue her with a notice to show cause. That her response to the show cause was unsatisfactory resulting in the decision to subject her to a disciplinary hearing. That the Disciplinary Committee considered the Claimant's defense and recommended that she be issued with a final warning. However, this decision was varied by the Respondent's management with the consequence that the Claimant's services were terminated.
18. The Respondent contends that its disciplinary procedure allows the management to vary the recommendation of the Disciplinary Committee where the circumstances permit. In this case, there was allegedly overwhelming evidence of gross misconduct by the Claimant which justified substitution of the recommendation to issue her with a warning with the decision to terminate her services.
19. The Respondent avers that prior to this incident, the Claimant had been involved in a series of other misconducts. First, she had irregularly withheld funds meant for account opening for two new customers. Second, she sometimes reported to work late or failed to report without permission of management.
20. According to the Respondent, the Claimant's conduct had dented its corporate image. Her actions had allegedly caused some of the Respondent's customers to take to social media to air their grievances regarding how they had been handled by the Respondent.
21. The Respondent avers that the decision to terminate the Claimant's employment took into account her cumulative conduct over the years. It is the Respondent's case that the mishandling of its customer by the Claimant coupled with her previous infractions rendered it imperative to relieve her of her duties.
22. The Respondent avers that it observed due process in handling the Claimant's case. First, it contends that it notified the Claimant of the charge against her. Second, it asserts that it convened a disciplinary meeting at which the Claimant and her representative were heard. Third, it avers that it allowed the Claimant to file an appeal thus offering her a chance to have her case considered a second time.
23. The Respondent denies that the decision to subject the Claimant to performance appraisal was actuated by ulterior motive. It contends that appraisal of its employees is provided for in its procedure manuals and serves the purpose of ensuring that the employees meet the set performance standards.
24. The Respondent contends that it paid the Claimant all her exit dues and issued her with a Certificate of Service. As such, the relation between them was effectively closed.



Issues for Determination

25. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues for determination in the cause:-
 - a. Whether the Respondent unlawfully terminated the Claimant's services.
 - b. Whether the Claimant is entitled to the reliefs that she seek through the Statement of Claim.

Analysis

26. The law requires that before an employer terminates an employee's services, he must have a valid reason for his decision. Further, he must ensure that the decision is processed in accordance with fair procedure.
27. Section 41 of the *Employment Act* obligates the employer to notify the employee of the infraction that he is accused of in a language that the employee understands and in the presence of the employee's representative (either a co employee or trade union representative), if the employee elects. Second, the employer is obligated to give the employee a chance to rebut the accusations against him.
28. Under sections 45 and 47 of the *Employment Act*, the burden of justifying the decision to terminate a contract of employment lies with the employer. All that the employee is required to establish by virtue of section 47 of the Act is that the decision to terminate the contract was prima facie unjustified.
29. If the employer is unable to demonstrate that he had valid reason to justify his decision and that he processed the decision in accordance with fair procedure, the law will presume in favour of the unfairness of the decision. However, in discharging this burden, all that is required of the employer by virtue of section 43 of the *Employment Act* is to demonstrate that at the time of making the decision he had genuine grounds to entertain a reasonable belief that he had valid grounds to terminate the contract. As such, there is no obligation on him (the employer) to provide infallible evidence to justify the validity of the decision to terminate the contract.
30. The standard of proof in determining the validity of the employer's action is that of a balance of probabilities. Further, the court relies on the test of a reasonable employer in evaluating the lawfulness of the employer's decision.
31. The foregoing has been affirmed in a number of judicial pronouncements. Referring to this test, the Court of Appeal in the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR stated as follows:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”



32. In the instant case, there is evidence of the Claimant having been involved in a series of breaches at the workplace. First, she is accused of having failed to credit two new accounts with funds which the Respondent's customers had left with her. Although she blames these occurrences on the Respondent's dysfunctional account opening procedures which sometimes led to delayed setting up of new accounts, she does not explain why she did not follow up on the two matters to ensure that the money that was entrusted with her was credited once the accounts were up and running. It is unclear why the Claimant had to await the complaints by the affected clients and the intervention by other bank employees to address the issues. This behaviour did not sit well with the Claimant's work environment where trust and honesty are of utmost importance.
33. There is evidence that the Claimant was subjected to a disciplinary process for these infractions. Minutes of the disciplinary meeting held on 28th October 2021 to address the matters were produced in evidence.
34. According to the minutes, the Claimant was found guilty of the infraction. The Respondent did not accept her explanation that part of her challenges emanated from family related problems. As such, she was issued with a warning letter dated 2nd November 2021.
35. The record shows that these incidences resulted in the affected clients taking to social media to air their grievances against the Respondent. Extracts of social media posts in this respect were produced in evidence. Undoubtedly, such negative publicity adversely affected the Respondent's corporate image.
36. There is also the issue of late reporting to work and being absent without permission. Although the Claimant was eventually cleared of these accusations after she presented her explanation on the incidences, it is apparent that the reason why the complaints arose in the first place was because of poor communication. For instance, when the Claimant fell sick, she alleges that she sent text messages to her immediate supervisor to notify him of her condition but the same were not delivered because she allegedly did not have airtime. She alleges that she could not fetch airtime for this purpose because the nearest shopping center is a little removed from her residence. As such, information about her absence from work due to sickness did not reach the Respondent until after 11.00 am on the material day.
37. Admittedly, the Claimant may have been unwell on the material date. However, the manner in which she discharged her obligation to notify the employer of her sickness was extremely casual. She had the duty to find a way to alert the employer in good time that she will not make it to work because of indisposition. The assertion that she could not fetch airtime to call or text the employer on account of the distance of the nearest shopping center from her house was sloppy. Does it mean that she had nobody to assist her in this respect? Does it mean that she was leaving in an island without family and neighbours who could have lend a helping hand?
38. The Claimant was also accused of mishandling the Respondent's client on 28th February 2022. The client had complained that the Claimant had handled him rudely and in an unprofessional manner leaving him dissatisfied with the Respondent's services. It is this last complaint that resulted in the Respondent's decision to terminate the Claimant's services.
39. The Claimant denies that she mishandled the client. However, the Respondent asserts that the Claimant's colleagues who were in the banking hall including the branch manager confirmed the client's version of events. The client was eventually served by another officer.
40. With the above events in mind, the question which the court must answer is whether a reasonable employer in the Respondent's shoes would probably have reached the same decision as the Respondent. The answer to this question is in the affirmative.



41. The above events resulted in a confidence crisis on the part of the Respondent. The events destroyed the Respondent's trust in the Claimant's commitment to honestly and diligently execute her duties. As such, the Respondent had valid reason to consider terminating the contract between them.
42. That notwithstanding, the law required the Respondent to process its decision in line with fair procedure. As such, the court needs to examine the record to ascertain whether the Respondent's action met this threshold.
43. The Claimant has attacked the Respondent's decision on the ground that it violated clause 5 of the Collective Bargaining Agreement dated 19th August 2021. The clause deals with termination of employment.
44. According to the Claimant, the infraction she was charged with did not fall in the category of infractions that can result in termination of one's employment without a final warning letter from the employer. She contends that she was issued with the first warning in April 2021 on account of poor performance. However, this warning ought to have been vacated when her performance appraisal was reviewed to show that she had met the employer's expectations.
45. The Claimant avers that she was issued with another warning on 2nd November 2021. Although it was marked as the final warning, this warning ought to have been indicated as the first one since the warning of April 2021 had been vacated. As such, when she was charged with another offense in March 2022, she ought to have been issued with a final warning instead of dismissal from employment.
46. On the other hand, the Respondent contends that the offense which led to the Claimant's dismissal from employment in March 2022 did not fall in the category of infractions for which a final warning was required before the decision to dismiss an employee. Rather, it was an offense that attracts instant dismissal from employment in terms of clause A5 of the Collective Bargaining Agreement.
47. The Respondent insists that the Claimant's conduct was insulting to its client. It argues that the manner in which the Claimant handled the client was condescending thus falling in the bracket of insulting behaviour under clause A 5 (a) (iii) of the Collective Bargaining Agreement.
48. Clause A 5 (a) (iii) of the Collective Bargaining Agreement reads as follows:-
 - “ Any of the following acts on the part of an employee shall constitute gross misconduct and or serious neglect and shall justify lawful grounds for summary dismissal:-
 - i. If he/she, without serious provocation, uses abusive or insulting language or is guilty of insulting behaviour to any client of the employer which, having due regard to the proper interests of the employer, renders his continuance in employment impracticable.”
49. The question to determine is whether the Claimant's impugned conduct amounted to insulting behaviour to the Respondent's client. Insulting behaviour is described as any statement or conduct which is deliberately disrespectful, offensive, scornful or derogatory towards another person. As such, insulting behaviour is not confined to the hurling of abusive words. Such behaviour may also arise in instances where one shows disrespect to the other or engages in conduct which is deemed as offensive to the other.
50. The Respondent's client accused the Claimant of having displayed bad attitude towards him when he sought her assistance to get a KASNEB fee deposit slip. Although the Claimant denies displaying such attitude to the client, the Respondent asserted that the Claimant's colleagues witnessed the altercation between her and the client.



51. Given the Claimant's past conduct and the statements from her colleagues and the client on the incident, the Respondent's Disciplinary Committee did not believe her assertion that she politely showed the client where to get the slip. The Committee believed that she had been less than candid on the matter.
52. What the client was basically saying was that the Claimant had treated him with disdain. He was basically stating that he felt treated with disrespect by a bank employee.
53. Juxtaposing the foregoing to my earlier description of what constitutes insulting behaviour, I am satisfied that the Respondent was justified in finding the Claimant's conduct as insulting to its client. As such, the Respondent was entitled to dismiss the Claimant under clause A 5 of the Collective Bargaining Agreement which did not require previous warnings.
54. Although the Respondent was entitled to terminate the Claimant's contract without the benefit of a final warning, there is evidence that its Disciplinary Committee nevertheless recommended that the Claimant be given a final warning. However and as indicated earlier, the Respondent's management disregarded this recommendation and opted to instead terminate the Claimant's employment.
55. The Respondent's witness asserted that the decision to disregard the Disciplinary Committee's recommendation was proper and in accordance with the Respondent's disciplinary procedures. However, the purported procedures were not tendered in evidence to support this assertion.
56. The question which the court has to grapple with is whether it was proper for the Respondent's management to disregard its Disciplinary Committee's recommendation to issue the Claimant with a final warning and instead terminate her contract. This matter has been considered in a number of decisions.
57. In *Joel Iseme Wasike v Defense Forces Canteen Organization* (2019) eKLR, the court was of the view that if an employer's Disciplinary Committee has recommended a lesser penalty than termination of an employee's employment, the employer cannot vary this recommendation without first affording the affected employee another opportunity to be heard with respect to the change. In reaching this conclusion, the court relied on the South African case of *South African Revenue Service v Commission for Conciliation, Mediation And Arbitration and Others* (C683/11) [2015] ZALCCT 14; [2015] 5 BLLR 531 (LC) (10 February 2015) which expressed a similar view.
58. In *Muraya & 4 others v Judicial Service Commission (Employment and Labour Relations Cause E003 of 2022)* [2023] KEELRC 2849 (KLR) (9 November 2023) (Judgment), the court expressed the view that if an employer has to vary or disregard the recommendations by his Disciplinary Committee, he should afford the employee an opportunity to comment on the matter particularly if the variation is adverse to the employee's employment. Otherwise, setting up of the Committee would be of no value.
59. Having regard to the foregoing, the Respondent's decision to modify the recommendation by its Disciplinary Committee on the penalty to issue to the Claimant was ill advised. From the record, it is apparent that this decision was effected without affording the Claimant an opportunity to comment on the matter.
60. The Claimant has accused the Respondent of failing to share the investigation report on the matter before the Disciplinary Committee sat to hear the case. On its part, the Respondent contends that the Claimant did not ask for this report before hearing of her case. Further, she allegedly did not raise this issue in her appeal. The Respondent avers that the issue has only been taken up in these proceedings.
61. I have considered the arguments on this aspect of the case in the context of the requirements of the *Fair Administrative Action Act*. Under section 4 of the Act, a decision maker has the duty to supply



- the person who is likely to be affected by the decision all information, material and evidence which is relevant to the making of the decision beforehand. This obligation is not pegged on the person who is likely to be affected by the decision requesting for the information. In my view, the decision maker must supply this information irrespective of whether there has been a formal request for it.
62. The essence of this requirement is to enable the person who is likely to be affected by the decision to make an informed response to the matter. Only then can it be said that the process was fair.
 63. The Respondent does not deny that the infraction in question was investigated. However, it does not give cogent reasons why it did not furnish the Claimant with a copy of the investigation report before it convened the disciplinary hearing. To this extent, the Respondent's decision is faulted.
 64. Save for the aforesaid lapses, the available evidence demonstrates that the Respondent largely complied with the procedural requirements that are attendant to the process of releasing an employee from employment. First, it issued the Claimant with a notice to show cause to explain why disciplinary action should not be taken against her for the infraction of 28th February 2022. This was followed with an invite to the Claimant to attend a disciplinary meeting. The invite informed the Claimant of her right to be accompanied by a representative.
 65. There is evidence that the disciplinary session was held and the Claimant given an opportunity to state her case. There is evidence that after the hearing, the Claimant was allowed to challenge the decision to terminate her contract on appeal. There is evidence that an appeal session was convened during which the Claimant was given a chance to re-state her case.
 66. It is apparent from the foregoing that the Respondent has demonstrated that it had valid reasons to consider terminating the Claimant's employment and that it substantially processed her release in accordance with fair procedure. However, it is also evident that there were some procedural flaws in the process when it (the Respondent) failed to furnish the Claimant with the investigation report on the incident before it convened the disciplinary hearing and altered the penalty proposed for the infraction without affording the Claimant an opportunity to be heard on the change. For this reason, the decision to terminate the Claimant's contract is declared procedurally flawed and therefore unfair.
 67. The next question for determination is whether the Claimant is entitled to the reliefs that she seek through the Statement of Claim. As has been observed above, the Respondent was substantially on track in processing the Claimant's release from employment both on account of the reasons for the decision and the procedure that was followed. However, there were shortfalls relating to the supply of information on the issues that were under consideration and alteration of the Disciplinary Committee's recommendation without first hearing the Claimant on the alteration.
 68. The foregoing leads me to the question whether it will be just and equitable to severely punish the Respondent for the above procedural failures. It appears to me to be unjust to close my eyes to the myriad infractions by the Claimant and unduly punish the Respondent on account of the aforesaid procedural flaws. Having regard to the foregoing and in order to balance the scales of justice, I consider this a fit case for awarding the Claimant compensation for unfair termination of her contract of service that is equivalent to her salary for three months. This will redress the procedural flaws aforesaid. Accordingly, the Claimant is awarded compensation for unfair termination of her contract in the sum of Ksh. 629,703.00. This amount is subject to the applicable statutory deductions.
 69. The aforesaid decision has taken into account some of the considerations under section 49 of the *Employment Act*. I have taken into account the fact that the Claimant's misconduct substantially contributed to the Respondent's decision to terminate her employment. I have also taken into account the fact that the parties had been in the employment relation for a long time.



70. I award the Claimant interest on the sum awarded at court rates from the date of this decision.

71. I also award the Claimant costs of the case.

Summary of Award

72. After evaluating the evidence on record, I arrive at the following conclusion and determination:-

- a. That the Respondent’s decision to terminate the Claimant’s contract of service had some procedural flaws. For this reason, the decision is declared unfair.
- b. The Claimant is awarded a sum that is equivalent to her salary for three months, that is to say, Ksh. 629,703.00, as compensation for the unfair termination of her contract.
- c. The award is subject to the applicable statutory deductions.
- d. The Claimant is awarded interest on this amount at court rates from the date of this decision.
- e. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

